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NO. 85-1910

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BUSINESS ELECTRONICS CORPORATION,
Petitioner

v.

SHARP ELECTRONICS CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONER BUSINESS ELECTRONICS CORPORATION

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QUESTION PRESENTED

The jury below found an agreement between the defendant supplier and a non-price cutting dealer to terminate a competing dealer for the purpose of eliminating price competition. On appeal, the defendant supplier did not contest the sufficiency of the evidence supporting this finding. Rather, the question presented here is whether dealer termination pursuant to a conspiracy to eliminate price competition constitutes price fixing in violation of the Sherman Act, absent an express finding of direct agreement on resale price levels.

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BRIEF OF PETITIONER BUSINESS ELECTRONICS CORPORATION*

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 780 F.2d 1212 and appears as Appendix A to the petition for writ of certiorari ("Pet. App."). The district court's unreported ruling denying Sharp Electronics Corporation's motions for a new trial and judgment n.o.v. appears

* Pursuant to Supreme Court Rule 28.1, Business Electronics Corporation has no parent companies, subsidiaries or affiliates.

as Pet. App. B. The *per curiam* opinion denying Business Electronics Corporation's suggestion for rehearing *en banc* appears as Pet. App. C.

JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 1986. A timely Suggestion for Rehearing En Banc was denied on February 20, 1986 (Pet. App. C.). A timely petition for Writ of Certiorari was filed on May 20, 1986. On June 17, 1987, this Court granted the petition. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

STATEMENT OF THE CASE

Nature of the Case.

This case presents a question regarding the scope of the *per se* rule against vertical price fixing under Section 1 of the Sherman Act. Specifically, the question is whether an agreement between a manufacturer and a distributor entered into for the purpose of eliminating price competition from another distributor constitutes a *per se* violation of the antitrust law. The Fifth Circuit below held that *per se* liability requires more than an unadorned agreement to eliminate price competition. According to

the Fifth Circuit, the jury must specifically find that the manufacturer and remaining dealer also agree to set prices "at some level". Since this has never been required as a condition for application of the *per se* rule against price fixing, the Fifth Circuit's erroneous ruling should be reversed.

Factual Background.

From 1968 until July 1973, Business Electronics Corporation ("BEC"), owned and operated by Kelton Ehrensberger, was an authorized dealer in Sharp brand electronic calculators in Houston, Texas.[1] BEC's only business was to buy calculators from Sharp Electronics Corporation ("Sharp") and sell them at retail.

Although Sharp suggested retail prices to its dealers and authorized specific discounts from list prices for certain accounts, BEC frequently sold at lower prices in greater discounts than those authorized by Sharp. Consequently, Sharp's Texas representative, Mr. Burkholder, complained to BEC about this price cutting, noting that BEC was "messing up" the market and "creating dealer complaints." Tr. 73-77, 239-40, 244; Px 52.[2] When BEC encountered problems in obtaining prompt delivery of preferred models in sufficient quantity, Burkholder said that Sharp was in a position to make inventory problems very "painful" for BEC if it continued to price the machines "arbitrarily". Tr. 79-80.

In mid-1972, Sharp threatened cancellation of BEC's dealership. At this time, Hiroshi Kawai, Sharp's vice-

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1. BEC was the sole authorized dealer to Sharp until June 1982.

2. "Tr." refers to the official transcript of the trial record below. "Px" refers to plaintiff's exhibits admitted into evidence below.

president, told Ehrensberger that he should "clean up his pricing structure." Tr. 81. Almost contemporaneously, Sharp appointed an additional dealer in Houston—Hartwell's Office World, owned and operated by Gil Hartwell. Hartwell soon began a campaign to stop BEC's price cutting. Tr. 174-75. In a July 1972 letter to Ehrensberger, copied to Sharp, Hartwell wrote that he would not "compete" with BEC for a particular customer "so the customer won't be able to play one of us against the other in a single 'discount' situation." Tr. 84-85; Px 40. Regarding this letter, Hartwell testified that he "was making the first step to lending some price stability to Mr. Ehrensberger" and that he intended to charge Sharp's suggested list prices. Tr. 276-77. Hartwell further testified that Ehrensberger was discounting from Sharp's suggested list price and that Hartwell wanted to avoid that. Tr. 278.

Hartwell Obtains Sharp's Agreement To Eliminate BEC's Price Cutting.

Hartwell thereafter complained to Sharp, including Burkholder, Tom Mashos (national sales manager) and Kawai, about BEC's price cutting, which Hartwell wanted stopped. Tr. 79, 280, 283, 287, 837. Kawai relayed these complaints to Burkholder and told him to "try to solve the problem." Tr. 628, 629, 636, 639. In October 1972, Burkholder wrote Kawai about "problems created by Ehrensberger," meaning the Hartwell complaints concerning BEC's price cutting. Tr. 933-34. In December 1972, Hartwell wrote to Kawai complaining again about BEC's "price cutting," Px 39; Tr. 88-90, which he wanted Kawai to correct. Tr. 286. Subsequently, Burkholder told Ehrensberger that he wanted BEC "to maintain the correct discount range." Tr. 91.

In mid-1973, Hartwell did more than complain. He demanded that Sharp terminate BEC for the *express* purpose of stopping the discounting. Hartwell delivered an "ultimatum" to Mashos: Because of BEC's price cutting, Hartwell would quit unless Sharp cancelled BEC. Within three weeks, Mashos complied with this demand and terminated BEC. Tr. 189-90, 586, 587, 1355-56. Thereafter, Hartwell remained as Sharp's Houston dealer. Tr. 294.

Hartwell's policy was to sell at Sharp's suggested list prices and he usually adhered to those prices in the years following BEC's termination. Tr. 294-95, 296, 398. Accordingly, Hartwell's gross margin—the difference between his cost of purchasing the product from Sharp and his resale price—increased substantially after BEC was terminated.[3]

The Jury Verdict For BEC.

BEC brought this suit under Section 1 of the Sherman Act, contending that Sharp and Hartwell had conspired to terminate BEC for the purpose of eliminating price competition. The district court submitted the following liability interrogatory to the jury:

> Question 1: Do you find by a preponderance of the evidence that there was an agreement or understanding between Sharp and Hartwell to terminate Business Electronics because of Business Electronics' price cutting?

The court instructed the jury that the plaintiff "must show . . . that Sharp and Hartwell knowingly came to a com-

3. Hartwell's gross profit margins increased from 33% in 1972 and 34% in 1973 to 43% in 1974 and 45% in 1975. Px 119; Tr. 389-91, 1156.

mon and mutual understanding to accomplish or attempt to accomplish an unlawful purpose. . . ." Tr. 1584; Joint Appendix ("JA") 15-16. The court further instructed the jury that:

> Plaintiff contends that Sharp terminated Business Electronics *in furtherance of Hartwell's desire to eliminate Business Electronics as a price cutting rival.* . . . Sharp, on the other hand, contends that it terminated Business Electronics unilaterally, not as a result of any agreement or understanding with Hartwell, but because of Business Electronics' sales performance. If you find that Sharp did not terminate Business Electronics pursuant to an *agreement with Hartwell to eliminate price-cutting* by Business Electronics then you should answer 'No' to Question Number 1.

Tr. 1587, JA 18-19 (emphasis added).

The jury answered Question 1 affirmatively, found that BEC had been injured as a result and awarded $600,000 in damages. Pursuant to 15 U.S.C. § 4, the district court entered judgment for BEC for treble this amount plus attorney fees.

After the district court denied Sharp's motions for judgment n.o.v. and for new trial, Sharp appealed to the United States Court of Appeals for the Fifth Circuit.[4]

4. Sharp did not contest the sufficiency of the evidence supporting the jury's finding of an agreement to terminate BEC for price related reasons. This case accordingly does not present the issue of whether the evidence satisfied the standard for proving collusion set forth in Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984). *See* Section I.C, *infra*. There is also no issue as to the sufficiency of the evidence to support a finding of unlawful price fixing even under the standard articulated by the Fifth Circuit. *See* 780 F.2d at 1219.

The Fifth Circuit's Reversal.

The Fifth Circuit reversed the judgment below and remanded for retrial acknowledging that its holding in this case directly conflicted with the holdings of at least four other circuit courts of appeals. *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 170 (3d Cir. 1979); *Victorian House, Inc. v. Fisher Camuto Corp.*, 769 F.2d 466, 469 (8th Cir. 1985); *Ziddell Exploration, Inc. v. Conval International, Ltd.*, 719 F.2d 1465, 1469 (9th Cir. 1983); and *Bostick Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207, 1215 (4th Cir.), *cert. denied*, 464 U.S. 894 (1983). The Fifth Circuit elected instead to follow *St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc.*, 457 So.2d 1028, 1050 [1984-1] Trade Cases (CCH) ¶ 65, 985 (Fla. 2d Dist. Ct. App. 1984), interpreting the Florida antitrust act and which is contrary to Supreme Court precedent construing the Sherman Act. *United States v. General Motors Corp.*, 384 U.S. 127, 148 (1966).

SUMMARY OF ARGUMENT

The jury below found that BEC was terminated by an agreement between Sharp and Hartwell in furtherance of Hartwell's desire to be rid of a price cutting rival. Sharp tried, but failed, to convince the jury that its motivation was not the elimination of price competition. JA 18-19. The express purpose of the agreement as found by the jury was to eliminate price cutting, i.e., to eliminate price competition. The Fifth Circuit ruled that the evidence was sufficient to support the jury's verdict. 780 F.2d at 1219. The trier of fact has thus found, on the basis of sufficient evidence, a naked restraint on price competition. Nevertheless, the Fifth Circuit reversed.

The Fifth Circuit's reversal rested entirely on its holding that the jury instructions failed to reflect the proper standard for a *per se* violation of the Sherman Act:

> [W]e hold that, in order for a manufacturer's termination of a distributor to be illegal *per se*, it must be pursuant to a price maintenance agreement with another distributor. That distributor must expressly or impliedly agree to set its price at some level, though not at a specific one. The distributor cannot retain complete freedom to set whatever price it chooses.

780 F.2d at 1218.

Each of these three statements forming the Fifth Circuit's holding is an incorrect statement of the law. A manufacturer's termination of a distributor may be illegal *per se* without being pursuant to a price maintenance agreement with another distributor. *See* Section II, below. Moreover, a *per se* illegal price maintenance agreement does not require a distributor to agree to set its price "at some level". *See* Section I.A, below. Finally, distributors who enter into illegal vertical price fixing agreements with manufacturers always retain "complete freedom" to set whatever prices they choose since such agreements are void and unenforceable as a matter of law. *See Dr. Miles Medical Co. v. John D. Park & Sons,* 220 U.S. 373 (1911) (vertical price fixing restrictions invalid and unenforceable).

In its opinion below, the Fifth Circuit incorrectly interpreted and misapplied the applicable antitrust law to the jury's verdict in this case. The jury's finding that Sharp terminated BEC pursuant to an agreement with

Hartwell to eliminate price cutting by BEC constitutes a *per se* violation of the Sherman Act. This agreement, although vertical in form, did not merely affect price competition indirectly or incidentally: its purpose was the elimination of price competition by BEC and it therefore constitutes a naked restraint on competition in violation of the Sherman Act.

An agreement to eliminate discounting by cutting off supplies to the competing discounter falls squarely within the *per se* ban on price fixing. *See United States v. Parke, Davis & Co.,* 362 U.S. 29 (1960); *United States v. General Motors Corp.,* 384 U.S. 127, 147-48 (1966); *Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643 (1980). There is absolutely no principled distinction between a supplier and distributor agreeing to eliminate discounting, which not even Sharp would dispute is *per se* illegal, and agreeing instead to eliminate the discounter. Yet precisely such a distinction is required by the Fifth Circuit's opinion which denies *per se* treatment to the latter agreement. There is also no precedent in the decisions of this Court for requiring a further agreement between the manufacturer and surviving distributor to set prices "at some level". Indeed, this additional requirement clearly contradicts the prior decisions of this Court, *see, e.g., United States v. Parke, Davis & Co.,* 362 U.S. at 43-44, which consistently recognize that an agreement to set prices "at some level" is not necessary for a *per se* illegal vertical price fixing agreement. The Fifth Circuit's unwarranted limitation of the *per se* rule in order to recognize the highly theoretical "freedom" of a surviving distributor to become a price cutter himself defies common sense. No conspiring distributor in the real world will use his freedom to do anything other than raise

his prices or his profit margins, as Hartwell did here. The Fifth Circuit's reasoning is also inconsistent with the rationale of the *per se* rule, which is designed to permit categorical judgments about practices that have proved to be "predominantly" anticompetitive and that almost always "tend" to decrease competition. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 105 S. Ct. 2613, 2617 (1985). An agreement between a manufacturer and distributor to terminate a competitor for the express purpose of eliminating his price competition clearly falls within the class of practices confirmed by experience as predominantly anticompetitive and which will almost always tend to make markets less. rather than more, competitive. *See* Section I.A, below.

Even under the erroneous standard adopted by the Fifth Circuit, the agreement found by the jury between Sharp and Hartwell "to eliminate price cutting by BEC" necessarily implies an understanding between Sharp and Hartwell that Hartwell would not follow the same discounting policy as BEC. This understanding between Hartwell and Sharp arises inescapably from their agreement to eliminate BEC's discounting. *See* Section I.B, below.

The Fifth Circuit's argument for its overly restrictive definition of *per se* illegality in this case also makes no sense when tested against the standard of liability applicable to cases characterized as boycotts. It has long been a *per se* antitrust violation for a manufacturer to combine with one or more distributors to cut off a competing distributor's access to the manufacturer's products for the purpose of eliminating price competition. *See, e.g., United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1235,

n.4 (7th Cir. 1982), *aff'd on other grounds,* 465 U.S. 752 (1984) (citing cases); ABA Antitrust Civil Jury Instructions (1985 Supp.) Section II.1(4), citing *Monsanto* boycott instruction. No agreement on price, whether direct, indirect or implied, between the manufacturer and the surviving distributor is necessary. *See* Section II, below.

Under any one of the above lines of cases an agreement such as the one found here and uncontested on appeal by Sharp, between a supplier and a non-price cutting dealer to terminate a competing dealer for *the purpose of eliminating price competition,* constitutes a *per se* violation of the Sherman Act. The Fifth Circuit's novel departure from the standard of *per se* illegality for concerted action undertaken for the very purpose of directly eliminating price competition creates a substantial loophole in the prohibition against price fixing, *see* Section III below, is in direct conflict with congressional intent and ignores the fact that any substantial change in the law of vertical price fixing must come from Congress, not from the courts. *See* Section IV, below.

Accordingly, the Fifth Circuit's decision should be reversed and BEC's judgment affirmed.

ARGUMENT

I. An Agreement to Eliminate Price Competition Constitutes Unlawful Price Fixing.

The jury's finding that Sharp terminated BEC pursuant to an agreement with Hartwell to eliminate price cutting by BEC stands condemned as *per se* unlawful because

it constitutes vertical price fixing. As all parties acknowledge, vertical price fixing has been a *per se* violation of the Sherman Act since this Court's decision in 1911 in *Dr. Miles Medical Co. v. John D. Park & Sons,* 220 U.S. 373 (1911). The Court has created an established body of precedent over the intervening seventy-six years condemning all manner of vertical agreements and combinations to limit or eliminate price competition. *See, e.g., United States v. A. Schrader's Sons, Inc.,* 252 U.S. 85 (1920); *Frey & Son, Inc. v. Cudahy Packing Co.,* 256 U.S. 208 (1921); *United States v. Bausch & Lomb Co.,* 321 U.S. 707 (1944); *Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384, 386 (1951); *United States v. Parke, Davis & Co.,* 362 U.S. 29 (1960); *Simpson v. Union Oil Co.,* 377 U.S. 13 (1964); *Albrecht v. Herald Co.,* 390 U.S. 146 (1968); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 455 U.S. 97, 102-03 (1980); and *324 Liquor Corp. v. Duffy,* 107 S. Ct. 720 (1987).

From the earliest years of national antitrust enforcement the Court has strictly adhered to the broadest possible protection of price competition under the Sherman Act, leaving it to Congress to legislate any deviations from that policy.[5] In 1974, Congress made price fixing a felony subject to

5. Congress has three times taken the opportunity to legislate changes in the economic policy of the Sherman Act unqualifiedly condemning vertical price fixing. First by passing the Miller-Tydings amendment to the Sherman Act, 50 Stat. 693 (1937) and then effectively expanding the scope of that amendment with the McGuire amendment to the Federal Trade Commission Act, 66 Stat. 632 (1952). The effect of these amendments was to permit states to legalize certain vertical price fixing agreements. Congress reversed this economic policy in 1975 by repealing the Miller-Tydings and McGuire amendments (effective March 12, 1976) as part of the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975).

fines of up to $1 million and up to three years imprisonment. 15 U.S.C. § 1. The Court has repeatedly emphasized the uniquely sensitive role that price competition plays in our economy, thereby making it "an object of special solicitude under the antitrust laws." *General Motors,* 384 U.S. at 148; *see Albrecht v. Herald Co.,* 390 U.S. 145, 154 (1968) (Douglas, J., concurring) (vertical price fixing *per se* illegal because of "great leverage" price has over the market); *United States v. Container Corp. of America,* 393 U.S. 333, 338 (1969) ("Price is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition"); *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 226, n.59 (1940) (price is the "central nervous system" of our economy).

Unadorned elimination of price competition is the vice common to all price fixing agreements. *Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 345 (1982) ("The aim and result of every price fixing agreement, if effective, is the elimination of one form of competition.") For this reason the Court has consistently condemned as *per se* illegal all agreements and combinations whose purpose is the direct suppression of price competition, whether the agreements or combinations themselves are termed "horizontal", *see e.g., United States v. Socony-Vacuum Oil,* 310 U.S. 150 (1940); *Arizona v. Maricopa County Medical Society,* 457 U.S. 330 (1982), or vertical, *see e.g., United States v. Parke, Davis & Co.,* 362 U.S. 29 (1960); *Albrecht v. Herald Co.,* 390 U.S. 146 (1968).[6]

6. The Court has often expressed its condemnation of vertical price fixing by referring to the same broad description of price fixing used in horizontal cases. *See, e.g.,* United States v. Parke, Davis

Although the Court has applied the *per se* rule even in horizontal contexts so as not to condemn out of hand *bona fide* joint ventures or other cooperative arrangements when some agreement on price is necessary to market the product at all, *see, e.g., Broadcast Music, Inc. v. Columbia Broadcasting Systems,* 441 U.S. 1, 9, 23 (1979); *NCAA v. Board of Regents,* 104 S. Ct. 2948, 2961 (1984), no such exception is applicable here. BEC's termination was not necessary or incidental to the implementation of some legitimate marketing arrangement between Sharp and its dealers intended to make Sharp products more competitive in the market at large, but rather resulted from Sharp and Hartwell's agreement "in furtherance of Hartwell's desire to eliminate Business Electronics as a price-cutting rival", Tr. 1587, JA-18, and Sharp's purpose to eliminate BEC's price cutting. Tr. 1588, JA-19.

Similarly, the reasons supporting application of the rule of reason to the grant of an exclusive distributorship have no relevance here. The Fifth Circuit mistakenly characterized BEC's termination as similar to an exclusive distributorship, which, though it may have the effect of raising prices, is not illegal *per se*. 780 F.2d at 1216. On the contrary, the evidence here demonstrated, and the

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& Co., 362 U.S. 29, 47 (1960) (condemning vertical price fixing and relying on, *inter alia,* definition of price fixing in *Socony Vacuum Oil*); Simpson v. Union Oil Co., 377 U.S. 13, 18 (1964) (relying upon *Socony Vacuum Oil* and *Parke, Davis*).

Indeed, from its inception the *per se* rule against vertical price fixing has reflected the Court's *per se* condemnation of horizontal price fixing. In the first vertical price fixing decision before the Court, *Dr. Miles,* the Court cited United States v. Addyston Pipe & Steel Co., 175 U.S. 211 (1899), a horizontal price fixing case, in support of its conclusion that the vertical price fixing agreements in question were *per se* violations of the Sherman Act. 220 U.S. at 407-08.

jury found, *more* than a mere exclusive distributorship agreement which might incidentally affect prices. The district court instructed the jury that it could find an unlawful conspiracy *only* if Sharp terminated BEC "pursuant to an agreement . . . with Hartwell *to eliminate price cutting* by BEC. . . ." Tr. 1587, JA-19. Bona fide exclusive distributorship agreements, however, are not aimed at the elimination of a competitor because of his discounting. The punitive termination of one dealer by agreement with a competitor for the purpose of eliminating price competition bears no resemblance, for example, to a network of exclusive distributorships designed by a manufacturer as part of a marketing strategy for the purpose of achieving increased inter-brand competition. *Compare Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 38 (1977) (territorial location restrictions part of manufacturer's marketing strategy to improve market position) *with Com-Tel, Inc. v. DuKane Corp.,* 669 F.2d 404, 411-412 (6th Cir. 1982) ("It would be unrealistic to assert that *DuKane* achieved distribution efficiencies through its arbitrary decision to exclude one customer from access to its products"); *see* L. Sullivan, Handbook of the Law of Antitrust (1977) ("Sullivan") 429 (citing cases). The agreement found by the jury below had nothing to do with rendering Sharp more competitive in the market at large and everything to do with the suppression of price competition.

A. An Agreement to Set Prices "At Some Level" Is Not Required for a *Per Se* Price Fixing Violation.

Because of the uniquely privileged position price competition enjoys under the antitrust laws, this Court has

consistently condemned vertical and horizontal price fixing in the broadest possible terms. *See United States v. Parke, Davis & Co.*, 362 U.S. at 47 ("any combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*", quoting *United States v. Socony Vacuum Oil Co.*, 310 U.S. at 223); *Socony Vacuum Oil Co.*, 310 U.S. at 222 (offense of price fixing does not require that prices be "fixed in the sense that they were uniform and inflexible. Price-fixing has no such limited meaning.").

Combinations and conspiracies to suppress or eliminate price competition have been declared *per se* illegal for decades without any requirement that the participants agree to set prices "at some level". *See, e.g., Sugar Institute v. United States*, 297 U.S. 553 (1936) (agreement to adhere to previously announced prices and terms of sale held *per se* unlawful even though the particular prices and terms were not themselves fixed by agreement); *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940) (concerted program of buying surplus gasoline on the spot market in order to prevent falling prices held *per se* unlawful despite no direct agreement on actual prices); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (agreement to fix trade credit held *per se* unlawful even absent direct agreement on prices); *United States v. Gasoline Retailers Association*, 285 F.2d 688 (7th Cir. 1961) (agreement not to advertise prices is *per se* illegal price fixing even without direct agreement on price); *United States v. United Liquors Corp.*, 149 F.Supp. 609 (W.D. Tenn. 1956), *aff'd per curiam*, 352 U.S. 991 (1957) (agreements establishing uniform costs and markups, adopting classifications of customers entitled to discounts and the percentage of

functional discounts held *per se* unlawful even though there was no agreement as to the price level from which individual dealers would compute discounts); *United States v. American Smelting & Ref. Co.*, 182 F.Supp. 834 (S.D.N.Y. 1960) (agreement specifying price differentials between grades of product held *per se* unlawful); *and see National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978) (engineering society's canons of ethics prohibiting professional engineers from discussing prices with potential customers held unlawful on their face).

Indeed, in vertical price fixing cases it is well settled that "agreements" to set prices—whether express or implied—are not required for *per se* violations of the Sherman Act. *See, e.g., United States v. Parke, Davis & Co.*, 362 U.S. 29, 43-44 (1960) (price maintenance agreement, express or implied, not necessary for unlawful combination: "The Sherman Act forbids combinations of traders to suppress competition"); *United States v. General Motors Corp.*, 384 U.S. at 147-48 (concerted elimination of sales to discounters held *per se* unlawful even though only indirectly affecting price); *see also United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 722 (1944) ("The Beech-Nut Company, without agreements, was found to suppress the freedom of competition by coercion of its customers through special agents of the company, by reports of competitors about customers who violated resale prices, and by boycotts of price cutters.). In *Parke, Davis* the Court struck down as *per se* unlawful price fixing an illegal combination among a supplier (Parke, Davis), its wholesalers and its retailers to cut off supplies of Parke, Davis products to discounting retailers without finding any agreement.

In *Catalano, Inc. v. Target Sales, Inc.*, this Court held that an agreement to eliminate credit terms was "tantamount to an agreement to eliminate discounting, and thus [fell] squarely within the traditional *per se* rule against price fixing." 446 U.S. at 648. The Court noted that:

> in . . . *Socony Vacuum* . . . we held that a program of buying surplus gasoline on the spot market in order to prevent prices from falling sharply was unlawful without any inquiry into the reasonableness of the program, *even though there was no direct agreement on the actual prices to be maintained.* . . .
>
> Thus we have held agreements to be unlawful *per se* that had substantially less direct impact on price than the agreement alleged in this case.

Id. at 647 (emphasis added). The Court further noted that the agreement to eliminate discounting was "merely one form of price fixing." *Id.* at 650.

There is thus no question that if BEC had agreed with Sharp (or with Hartwell) to eliminate its discounting there would have resulted a *per se* violation of the Sherman Act for price fixing. *United States v. Parke, Davis & Co., supra; Catalano, Inc. v. Target Sales, Inc., supra.* The record below demonstrates that Sharp and Hartwell tried to get BEC's cooperation in just such an agreement. Tr. 73-77, 79-81, 84-85, 74-75, 239-40, 276-77. After BEC refused, Sharp and Hartwell agreed to eliminate BEC's discounting themselves by the simple expedient of eliminating the discounter, BEC. In *General Motors,* the Court recognized that this constitutes a distinction without a difference for purposes of applying the *per se* rule.

The Court refused "to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely." 384 U.S. at 148. The jury below found that BEC was put out of business entirely by an agreement between Sharp and Hartwell to eliminate BEC's price cutting. JA 18-19. This concerted action by Sharp and Hartwell for the purpose of eliminating price competition by BEC clearly warrants application of the *per se* rule against vertical price fixing. *United States v. General Motors, supra; United States v. Parke, Davis & Co., supra; Catalano, Inc. v. Target Sales, Inc., supra.*

The Fifth Circuit ignored or rejected these precedents and reasoned that an agreement to terminate a price cutter does not literally "fix" prices at any specific or general level but "merely frees the complaining dealer to set prices he chooses." 780 F.2d at 1216. The Fifth Circuit's reasoning can only be understood as a concern to recognize the theoretical "freedom" of the conspiring dealer to become a price cutter himself, thereby making application of the *per se* rule inappropriate. Under comparable reasoning, a bank robber is also theoretically "free" to return stolen money to the bank, but even a little experience in the world at large teaches that such freedom is not likely to be exercised. As a matter of common sense, no dealer who agrees with a supplier to terminate a competitor in order to eliminate that competitor's price cutting will do anything other than raise his prices or his profit margins following the termination. In fact, that is precisely what happened in this case. Hartwell's gross profit margins rose substantially (from 33% in 1972 and 34% in 1973 to 43% in 1974 and 45% in 1975) following BEC's termination. Px 119, Tr. 389-91, 1156.

The misguided notion that elimination of a price cutting competitor merely "frees" the remaining dealer to engage in discounting overlooks entirely the very purpose of the concerted termination and completely ignores the practical realities of this case and cases like it.

Limiting the *per se* rule because of the extremely unlikely possibility that a successfully conspiring dealer might then turn around and begin price cutting himself misunderstands the proper role of the *per se* rule. The *per se* rule is designed to permit economical, categorical judgments with respect to business practices that have proved to be "predominantly" anticompetitive, that almost always "tend" to decrease economic efficiency and render markets less, rather than more, competitive. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 105 S. Ct. at 2617; *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 104 S. Ct. 2948, 2962 (1984) (*per se* rules apply when surrounding circumstances make the "likelihood" of anticompetive conduct so great as to render unjustified further examination of challenged conduct). Thus, even when, under an unusual set of circumstances, the *per se* rule invalidates some agreements that a full inquiry might have proved reasonable, this result is tolerated for the sake of business certainty and litigation efficiency. *Arizona v. Maricopa County Medical Society*, 457 U.S. 330, 343-44 (1982). *Per se* rules are designed to be "broad generalizations" about the social utility of particular practices, *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50, n.16, and must therefore be based on common experience rather than uncommon and highly theoretical exceptions:

> Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time necessary to identify them.

Id.

In the present case, common sense and experience teach that conspiring dealers who use their theoretical "freedom" to become discounters will be neither "sufficiently common or important to justify the time necessary to identify them" and do not, therefore, warrant a limitation on the *per se* rule such as the Fifth Circuit has imposed.

B. The Agreement to Eliminate BEC's Price Cutting Necessarily Implies an Agreement Between Sharp and Hartwell to Set Prices "At Some Level".

Although as discussed above, the *per se* rule against price fixing has never required violators to agree to set prices "at some level", the agreement found by the jury in this case necessarily implies such an agreement between Sharp and Hartwell. The jury's finding that Sharp agreed with Hartwell to terminate BEC *in order to eliminate BEC's price cutting* entails an understanding between Sharp and Hartwell that Hartwell would not pursue the BEC's same discounting policy. In other words, the jury's finding requires the conclusion that Sharp and Hartwell agreed to set prices at a level higher than BEC's, "though not a specific one." 780 F.2d at 1218. No other interpretation of the Sharp-Hartwell agreement makes any economic sense. *Cf. Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1361-62 (1986) (absense of any rational motive to conspire excludes jury inference of conspiracy). Vertical price fixing agreements

"implied from a course of dealing or other circumstances" are just as subject to the rule of *per se* illegality as express agreements. *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920); *Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U.S. 208, 210 (1921) (essential agreement, combination or conspiracy may be implied from a course of dealing or other circumstances); *see also United States v. Parke, Davis & Co.*, 362 U.S. 29, 43-44 (combinations of traders to suppress competition are sufficient to trigger Sherman Act liability, neither express nor implied agreements are required).

Accordingly, since the jury's verdict in this case necessarily implies an agreement that Hartwell would not follow the discounting policies of the distributor he and Sharp had just agreed to terminate precisely in order to eliminate such discounting, even the erroneous standard of liability articulated by the Fifth Circuit was satisfied here.

C. Monsanto Does Not Justify Naked Restraints On Price Competition.

Although acknowledging that *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), "did not expressly disapprove" the rule embodied in the jury instructions below, 780 F.2d at 1218, the Fifth Circuit nevertheless extrapolated the *Monsanto* holding beyond its intended limit. In *Monsanto*, this Court held that concert of action cannot be inferred from mere evidence of dealer pricing complaints followed by termination in response to those complaints. The Court found such evidence to be "highly ambiguous," since it does not exclude the possibility that the manufacturer unilaterally decided to terminate. Thus, *Monsanto* requires the plaintiff to adduce additional "evidence that tends to exclude the

possibility that the manufacturer and non-terminated distributor were acting independently." 465 U.S. at 764. Going far beyond this holding, the Fifth Circuit concluded that even an actual *agreement* to terminate because of price cutting does not constitute price fixing, since, the court reasoned, only a "mind reader" could distinguish between such an agreement and unilateral termination in response to dealer complaints. 780 F.2d at 1218. The Fifth Circuit's reasoning will not withstand analysis.

First, *Monsanto* dealt only with the minimum proof required to show concert of action. Here, Sharp did not contest the sufficiency of evidence supporting the jury finding of collusion. Second, asking the trier of fact to determine whether the evidence shows an agreement to terminate for the purpose of eliminating price cutting entails no extraordinary feat. Every day juries are asked to find the presence (or absence) of specific intent, based upon direct and circumstantial evidence. Here, the evidence supporting the jury's finding of intent was overwhelming and required no mind-reading skills, only the ability to draw reasonable inferences. The Fifth Circuit itself observed:

> There was evidence that, even before Hartwell became a dealer, Sharp sought BEC's adherence to the suggested retail price list. BEC produced evidence tending to show that it was not "free-riding" and that its sales performance was equal to Hartwell's. The logical inferences from such evidence, if drawn by the jury, could support a finding that BEC's termination was not due to the reasons Sharp suggests.
>
> In addition, there was evidence that Hartwell usually followed Sharp's suggested prices. There was also evidence that Hartwell sought to encourage BEC to fol-

> low these prices. Finally, the record shows that Hartwell complained vigorously to Sharp about BEC's pricing and that ultimately Sharp responded by terminating BEC. This evidence, taken as a whole and viewed in the light most favorable to BEC, could support an inference that Sharp and Hartwell had agreed that Hartwell would follow Sharp's suggested retail prices and that BEC's termination was pursuant to this agreement.

780 F.2d at 1219 (citation omitted). This evidence, along with Hartwell's express demand that Sharp terminate BEC for price cutting, satisfies the *Monsanto* requirement of "evidence which tends to exclude the possibility that the manufacturer and non-terminated distributor were acting independently," and removes this case from the mere "termination-in-response-to-complaints" category.

II. Whether Strictly Characterized as Price Fixing or Not, an Agreement Between Manufacturer and Dealer to Terminate a Discounting Competitor for the Purpose of Eliminating Price Competition is Illegal *Per Se*.

An agreement between a manufacturer and one or more distributors to cut off a competing distributor's access to the manufacturer's products for the purpose of eliminating price competition has been condemned as a *per se* illegal in virtually every circuit to consider the issue. *See, e.g., Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979); *Malley-Duff & Associates v. Crown Life Ins. Co.*, 734 F.2d 133 (3d Cir.), *cert. denied*, 469 U.S. 1072 (1984); *Bostick Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207 (4th Cir.), *cert. denied*, 464 U.S. 894 (1983); *Jayco Systems v. Savin Business Machines Corp.*, 777 F.2d 306, 317-18 (5th Cir. 1985) (*per se* violation

where supplier refuses to deal with or acts to terminate a customer at the behest of the customer's competitor); *Com-Tel, Inc. v. Dukane Corp.*, 669 F.2d 404 (6th Cir. 1982); *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1235 n.4 (7th Cir. 1982), *aff'd on other grounds*, 465 U.S. 752 (1984) (Monsanto could not lawfully terminate Spray-Rite's distributorship pursuant to an agreement with its distributors because such conduct is a concerted refusal to deal which is *per se* unlawful even if not part of a scheme to fix resale prices); *Victorian House, Inc. v. Fisher Camuto Corp.*, 769 F.2d 466 (8th Cir. 1985); *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, Slip Op., LEXIS Gen. Fed. Library (8th Cir. 1987); *Ziddell Exploration, Inc. v. Conval International, Ltd.*, 719 F.2d 1465, 1469 (9th Cir. 1983); *see also M & H Tire Co. v. Hoosier Racing Tire Corp.*, 733 F.2d 973 (1st Cir. 1984).[7]

Many of these decisions rely not only upon traditional price fixing analysis, but also upon a group boycott

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7. Only some decisions in the Fifth, Seventh and Tenth Circuits appear to have taken the position that a concerted refusal to deal in order to suppress price competition is not *per se* illegal. *See, e.g.*, Business Electronics Corp. v. Sharp Electronics Corp., 780 F.2d 1212 (5th Cir. 1986); Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1440 (7th Cir. 1986) (Posner, J.) (following *Sharp*); Westman Com'n Co. v. Hobart Intrn., Inc., 796 F.2d 1216, 1223 (10th Cir. 1986) (following *Sharp*).

The Tenth Circuit's adherence to *Sharp* may be more in form than in substance. *Westman* did not involve the termination of a price-cutting distributor but rather a manufacturer's refusal to appoint plaintiff as a new distributor at the urging of an existing distributor who feared the prospect of new competition. 796 F.2d at 1219. Thus, unlike the case at bar, no actual competition was extinguished in *Westman*, see Sullivan, 428-29, and there was no indication that the plaintiff was a price-cutter or that the refusal to deal was intended to have any direct effect on price. *Compare* 796 F.2d at 1223.

analysis. In *Monsanto,* for example, the trial court instructed the jury in both price fixing and boycotts as alternative theories of liability, *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. at 758, n.2 (interrogatories 1 and 3), and the court of appeals affirmed the boycott instruction, *Spray-Rite Service Corp. v. Monsanto,* 684 F.2d at 1235, n.4. The *Monsanto* boycott instruction is part of the ABA's Antitrust Civil Jury Instructions (1985 Supp.) § II.A.(4) "Refusal to Deal". *And see Jayco Systems v. Savin Business Machines Corp.*, 777 F.2d at 318, n.41 (facts that might justify a preliminary finding of group boycott would be where supplier, alone or with other dealers, conspired with complaining dealer to deny supplies to a competitor). With respect to the kind of agreement at issue here, these alternative theories of *per se* liability—price fixing or group boycott—complement each other. An agreement to terminate a discounter in order to eliminate his discounting is a concerted refusal to deal whose purpose is to eliminate price competition by a competitor.[8]

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8. As a practical matter there can be no bright line drawn between vertical price fixing to eliminate discounts and group boycotts to eliminate discounters. In *General Motors,* for example, which is traditionally treated as a boycott case, Justice Harlan concurred by noting that there was no tenable reason for differentiating it from the Court's vertical price fixing decision in United States v. Parke, Davis & Co., 362 U.S. 29 (1960) and concluded that *Parke, Davis* controlled. 384 U.S. at 148-149. Cernuto, Inc. v. United Cabinet Corporation, 595 F.2d 164 (3d Cir. 1979), which relied on the boycott case of *General Motors,* was a resale price maintenance case. *Cernuto,* however, is frequently cited as precedent in boycott cases. *See, e.g.,* Malley-Duff & Associates v. Crown Life Ins. Co., 734 F.2d 133 (3d Cir.), *cert. denied,* 469 U.S. 1072 (1984); Victorian House, Inc. v. Fisher Camuto Corp., 769 F.2d 466 (8th Cir. 1985). Whether characterized as "price fixing" or "boycott", the conduct has the purpose of eliminating competition—a naked restraint of trade under the Sherman Act.

The Fifth Circuit's argument for its overly restrictive definition of *per se* illegality makes no sense when tested against the standard of liability applicable to cases characterized as illegal boycotts.[9] Under the Fifth Circuit's rule, the same behavior calls for application of the rule of reason if it is called vertical price fixing and the *per se* rule if it is called a boycott.

A seminal group boycott case, *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), supports application of the *per se* rule here. In *Klor's,* Broadway-Hale, a department store competitor of plaintiff Klor's, allegedly combined with ten national manufacturers and their distributors to cut off supplies to Klor's or to sell to Klor's only at highly unfavorable terms. 359 U.S. at 208-209. This Court found the resulting group boycott to constitute a *per se* violation of the Sherman Act. Although Klor's sold a wide variety of retail appliances, the "wide combination consisting of manufacturers, distributors and a retailer" eliminated Klor's "freedom to buy appliances in an open competitive market" and deprived the manufacturers and their distributors of the freedom to sell to Klor's. 359 U.S. at 213. The Court rejected any analogy

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9. The Court has aptly noted that boycotts "are not a unitary phenomenon". Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 105 S. Ct. at 2619, *quoting* St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 543 (1978). The Court has generally applied the *per se* approach to

> joint efforts *by a firm* or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.

105 S. Ct. at 2619, *quoting* Sullivan, 261-262 (emphasis added). *And see* Sullivan, 231, n.1.

There is even greater reason to condemn a concerted refusal to deal such as the one here whose express purpose is to extinguish price competition. *See* United States v. General Motors Corp., 384 U.S. at 148.

between the combination instigated by Broadway-Hale, whose purpose and effect was to eliminate Klor's as an effective competitor, and the unilateral refusal to deal by one trader with another or a manufacturer and a dealer agreeing to an exclusive distributorship. 359 U.S. at 212. A contrary rule would mean that "a group of powerful businessmen may act in concert to deprive a single merchant, like Klor, of the goods he needs to compete effectively." 359 U.S. at 210.

Similarly, *United States v. General Motors Corp.*, 384 U.S. 127 (1966), strongly supports application of the *per se* rule to the instant case. In *General Motors* a number of Chevrolet dealers in the Los Angeles area supplied discount houses with new Chevrolets which were in turn sold to consumers at allegedly bargain prices. 384 U.S. at 130-132. As the volume of these discount sales increased, Chevrolet dealers located near the discount outlets began to feel the pinch. Members of the local Chevrolet Dealers Association attempted to persuade Chevrolet dealers doing a substantial business with the discounters to stop, but to no avail. 384 U.S. at 133-34. Finally, the dealers enlisted the agreement of their common supplier General Motors, to put a stop to the sales to discounters. Within a month, General Motors had elicited from each dealer a promise not to do business with the discounters. 384 U.S. at 136.

In *General Motors* this Court held that the acts just described constituted "a classic conspiracy in restraint of trade: joint collaborative action by dealers, the appellee associations, and General Motors to eliminate a class of competitors by terminating business dealings between them and a minority of Chevrolet dealers. . . ." 384 U.S. at 140. The Court summarily rejected General Motors'

argument that its actions should be judged by the rule of reason as applied to its dealer location clause,[10] rejected the finding of the district court that the actions of the defendants were "unilateral" or "merely parallel" as being beyond any "stretch of the imagination" and declared that

> Elimination by joint collaborative action of discounters from access to the market is a *per se* violation of the Act.

384 U.S. at 145. The Court cited *Klor's* and other boycott cases in support of its decision:

> The principle of these cases is that where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct. . . . Exclusion of traders from the market by means of

10. *General Motors* apparently tried to argue that its actions should be judged under the rule of reason enunciated in White Motor Co. v. United States, 372 U.S. 253 (1963) since the same results could just as well have been obtained by General Motors' unilateral enforcement of its dealer location clause. The Court summarily rejected this attempt to justify what *General Motors* actually did (reaching agreement with dealers to eliminate sales to discounters) by what it might have done (unilaterally enforce its dealer location clause). Having unlawfully combined with its dealers,

> [W]hatever *General Motors* might or might not lawfully have done to enforce individual Dealer Selling Agreements by action within the borders of those agreements and the relationship which each defines, is beside the point.

384 U.S. at 140. The fact that there may also be lawful means to achieve the same or substantially similar results achieved by illegal means obviously cannot immunize unlawful behavior. In the instant case, for example, the fact that Sharp might have lawfully terminated BEC unilaterally under United States v. Colgate Co., 250 U.S. 300 (1919), does not immunize Sharp from liability when it combined all BEC's competitors to do so.

> combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins or their system for distributing automobiles. . . .

384 U.S. at 146.

The Court went on to note yet another reason for condemning the combination in *General Motors* as illegal ***per se***:

> [I]nherent in the success of the combination in this case was a substantial restraint upon price competition—a goal unlawful *per se* when sought to be effected by a combination or conspiracy; *e.g., United States v. Parke, Davis & Co.,* 362 U.S. 29; *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150. And the *per se* rule applies even when the effect upon prices is indirect. *Simpson v. Union Oil Co.,* 377 U.S. 13; *Socony-Vacuum Oil Co., supra.*
>
> There is in the record ample evidence that one of the purposes behind the concerted effort to eliminate sales of new Chevrolet cars by discounters was to protect franchise dealers from real or apparent price competition. . . .
>
> The protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws. We cannot respect that solicitude by closing our eyes to the effect upon price competition of the removal from the market by a combination or market, by a combination or conspiracy, of a class of traders. Nor do we propose to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely.

384 U.S. at 147-48.

The principles used by the Court to condemn the anticompetitive combinations in *Klor's* and *General Motors* are equally applicable to the present case. Hartwell, BEC's competitor, first sought BEC's cooperation in terminating its discounting of Sharp products. When that effort failed, Hartwell, like Broadway-Hale and the General Motors dealers, used its leverage with their common supplier to obtain an agreement to cut off BEC's supplies. As was the case in *General Motors,* Hartwell needed only to reach agreement with one supplier, Sharp, because Sharp was BEC's sole source of supply: BEC sold no other products. What Hartwell was therefore powerless to achieve alone, he was able to achieve by agreement with Sharp. The result, as in *General Motors,* is a "classic conspiracy" to drive out competition. 384 U.S. at 140.

This is accordingly *not* a case in which firms engage in some legitimate joint effort seemingly "designed to increase economic efficiency and render markets more, rather than less competitive." *See, e.g., Northwest Wholesale Stationers, Inc.,* 105 S. Ct. at 2620 (reasonable rules necessary for functioning of wholesale purchasing cooperative enabling smaller retailers to compete more effectively judged by "rule of reason" standard). The joint effort between Sharp and Hartwell here was simply a conspiracy to eliminate price competition by BEC, not to render Sharp more competitive in the market at large. *Id.,* (practices subject to *per se* rule "were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive."). The jury found that Sharp and Hartwell agreed to eliminate BEC *because* of its price cutting. This "vertical" agreement represents the

elimination of price competition by one competitor at the instigation of another. As Professor Sullivan has noted:

> when an existing dealer enlists the manufacturer to choke off one of the dealer's competitors, although the 'agreement' which enables Section 1 to be invoked is vertical, the restraint thereby achieved is horizontal in its impact: *it is an attack by one dealer against another.*

Sullivan, 429 (emphasis added).

The present case warrants *per se* condemnation of the Hartwell-Sharp agreement to eliminate BEC's price cutting on the same principles applied to illegal boycott to drive out competition in *General Motors* and *Klor's.*

Some courts appear to reject direct application of "classic" boycott rules unless there is some element of horizontal collusion present. *See, e.g., Lomar Wholesale Grocery, supra,* Slip Op. at 15 ff. (refusals to deal involving no concerted action between horizontal competitors do not constitute unlawful group boycotts) (citing cases). Other courts have taken a different view. *See, e.g., Com-Tel v. DuKane Corp.,* 669 F.2d 404 (6th Cir. 1982); *M & H Tire Co. v. Hoosier Racing Tire Corp.,* 733 F.2d 973, 978 (1st Cir. 1984).

Clearly, however, the principles condemning anticompetitive boycotts *per se* do not require horizontal collusion at the "blockaded" or dealer level, since *Klor's* involved the action of only one firm at that competitive level, Broadway-Hale. Just as clearly, horizontal collusion need not be present at the "blockading" or supplier level, since *General Motors* concerned the action of only one firm at that competitive level, General Motors Corporation. In fact, the presence of horizontal collusion in both these cases was only incidental to the effective exercise of vertical leverage against the targeted dealer. In *General Motors,* for example, although non-discounting Chevrolet dealers were part of the unlawful conspiracy, their "horizontal" collusion had been utterly ineffective in halting sales to discounters. 384 U.S. at 133-34. Only the dealers' success in enlisting General Motors to agree to exploit its vertical leverage as the sole source of supply of Chevrolet automobiles to Chevrolet dealers rendered the boycott in *General Motors* effective. Similarly, in *Klor's* the only horizontal collusion in that case took place at the supplier level. The agreement among major appliance manufacturers not to deal with Klor's or to deal only on unfavorable terms made the boycott in that case effective, since Klor's carried a full line of appliances from a variety of manufacturers without substantially all of *Klor's* suppliers enlisted as part of the boycott, *Klor's* would otherwise have been able to continue competing with Broadway-Hale. The essential conditions of a successful boycott were met in *Klor's* by each manufacturer agreeing with Broadway-Hale to discriminate against Klor's, not by allegedly agreeing with each other to do so. Where, as in the present case, a dealer has only a single source of supply, of course, no collusion at the supplier level is required to make the boycott effective.

As Professor Sullivan observed in his discussion of the *per se* rule applied to boycotts:

> [I]t is conceivable that only a single firm at the blockaded level [Hartwell] may succeed in coercing or inducing . . . one important supplier [Sharp] from dealing with one or more would-be competitors

> [BEC] . . . such an arrangement would display all essential elements of a boycott.

Sullivan 231, n.1.

In the present case, just as in the cases of *Klor's* and *General Motors,* the harmful effects on the victims of the boycotts — BEC, Klor's and the discounting Chevrolet dealers—do not depend upon the existence of any horizontal collusion but rather upon the anticompetitive agreements between the competing dealer and common supplier in which the supplier's leverage is exploited to choke off competition at the dealer level. It is the vertical leverage of the target company's supplier, exerted in concert with the target's competitor, that constitutes the boycott. Such concerted action taken for the purpose of excluding a competitor from the market warrants application of the *per se* rule whether or not there is any horizontal collusion. *See General Motors,* 384 U.S. at 146 ("The principle of these cases is that where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct."); *Com-Tel, Inc.,* 669 F.2d at 414 ("The application of group boycott theory does not turn on the number of parties in a combination; rather it is applied to prohibit the exclusionary practices inherent in a boycott which are inconsistent with the free-market principles embodied in the Sherman Act").

Even courts which resist applying the boycott rules directly without some horizontal collusion being present make an exception for and include within the *per se* rule vertical concerted refusals to deal which are "price related" as in the case at bar. *See, e.g., Lomar Wholesale Grocery,*

Slip Op. at 15-16 (vertical concerted refusals to deal subject to rule of reason analysis unless price-related or designed to enforce underlying restrictions otherwise subject to *per se* analysis).

Per se treatment is especially warranted where, as here, the challenged agreement expressly seeks to restrain price competition, "an object of special solicitude under the antitrust laws." *General Motors,* 384 U.S. at 148. To reject the application of the *per se* rule to an agreement whose purpose is so explicitly anticompetitive would require this Court to "[close its] eyes to the effect of price competition of the removal from the market by combination of conspiracy" of the only source of intra-brand competition for Sharp products in the Houston market. *Id.* The Court has previously rejected proposals "to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely." *Id.* The Court has thus squarely condemned as unlawful *per se* agreements such as the one at issue here to terminate a rival for price cutting.

III. The Fifth Circuit's Decision Creates an Unprecedented, Substantial Loophole in the Important Federal Prohibition Against Price Fixing.

The Fifth Circuit's decision creates an enormous "loophole" in the important federal prohibition against price fixing. The Fifth Circuit's ruling permits a dealer to use a manufacturer as his agent in order to eliminate a competitor who refuses to fix prices. Dealers may therefore obtain a manufacturer's agreement to police discounting by other dealers so long as the manufacturer and dealer

do not agree "on some price level." The result is a trivialization of the *per se* rule against vertical price fixing. For manufacturers and distributors interested in eliminating discounting, there is simply no need for an agreement on specific prices if the *per se* rule can be evaded simply by agreeing to terminate any discounters. The Fifth Circuit's decision would substantially rob the *per se* rule against vertical price fixing of most practical application, particularly with respect to price restraints initiated by dealers, which typically present the greatest danger to competition.[11]

IV. Congress Has Rejected The Limitation On The *Per Se* Rule Put Forward In The Decision Below And Any Substantial Change In The Law Of Vertical Price Fixing Must Come From Congress.

As demonstrated above, a naked agreement between a manufacturer and distributor for the purpose of eliminating price competition from a competitor has long been condemned as *per se* illegal under the Sherman Act. Since passage of the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801, Congress has repeatedly endorsed an unqualified *per se* rule against vertical price fixing. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51, n.18 (1977) (Noting that Congress recently expressed approval of a *per se* analysis of vertical price restrictions by enacting Consumer Goods Pricing Act of 1975). Congress has opposed not

11. The question of whether vertical price fixing should continue to be *per se* illegal as it has since 1911 is raised by Sharp's cross-petition, upon which the Court has not yet acted. Accordingly, petitioner BEC has not addressed this issue.

only the obvious overruling of the *per se* rule but also any attempt to dilute or trivialize it.

On January 23, 1985, the Department of Justice published its Vertical Restraints Guidelines, *reprinted in* 5 [Trade Reg. Rep.] (CCH) ¶ 50,473. In an effort to urge a greatly reduced *per se* rule applicable to vertical price fixing, the Guidelines proposed a qualification of the rule similar to that adopted by the Fifth Circuit below:

> Before characterizing a practice as a price restraint subject to *per se* condemnation, there must be an agreement between a supplier and its distributors as to resale prices. . . .
>
> The Guidelines will apply *unless* there is direct or circumstantial evidence (other than effects on price) establishing an *explicit agreement as to the specific prices at which the goods or services would be resold.*

Id. at p. 56,191 (emphasis added).

Congress reacted by denouncing the Guidelines as an inaccurate statement of case law and of congressional intent:

> Whereas such policy guidelines are inconsistent with established antitrust law as reflected in Supreme Court decisions and statements of congressional intent . . . in stating that *vertical restraints that have an impact upon prices are subject to the per se rule of illegality only if there is an "explicit agreement as to specific prices";* in stating that restraints imposed by a manufacturer at the request of dealers are vertical in nature and therefore not subject to the *per se* rule of illegality. . . . Now, therefore, be it

> Resolved, That it is the sense of the Congress that the antitrust enforcement policy guidelines stated in "Vertical Restraints Guidelines", published by the Department of Justice on January 23, 1985—
>
> (1) *are not an accurate expression of the Federal antitrust laws or of congressional intent with regard to the application of such laws to resale price maintenance and other vertical restraints of trade. . . .*

Departments of Commerce, Justice, and State, the Judiciary and Related Appropriation Act, 1986, Pub. L. No. 99-180, 99 Stat. 1136, 1169-70 (1985).[12] Thus, Congress only two years ago *explicitly rejected* the very same restriction on applying the *per se* rule against vertical price fixing—that there must be an agreement to set prices at some level—created by the Fifth Circuit's decision in this case.

When confronted with a longstanding statutory construction that Congress has consistently refused to disturb, even when revisiting this specific area of the law, *Square D Co. v. Niagara Frontier Tariff Bureau, et al.*, 106 S. Ct. 1922, 1927-28 (1986), this Court has consistently and properly deferred to congressional intent, rather than itself engaging in the formulation of national economic policy. *See Arizona v. Maricopa County Medical Society*, 457

12. On December 9, 1985, the House of Representatives also passed a House Resolution, H.R. Res. 303, criticizing the Guidelines for "qualifying the accepted rule that vertical price fixing in any context is illegal *per se*." The House Judiciary Committee's Report accompanying H.R. Res. 303 disavows the Guidelines' view on vertical price fixing as an attempt to "dilute or trivialize the generality of the *per se* rule against price fixing, both horizontal and vertical." House Judiciary Committee's Report on Vertical Restraints Guidelines Resolution, H.R. Rep. No. 99-399, 99th Cong., 1st Sess. 6, *reprinted in* 49 Antitrust & Trade Regulation Report (BNA) 952, 956 (Nov. 28, 1985).

U.S. at 355, n.30 ("[Congress] can, of course, make *per se* rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach", quoting *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610, n.10 (1972)).

In *Square D* this Court was asked to overturn *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156 (1922), holding that Interstate Commerce Commission approval of tariff rates fixed in violation of the antitrust laws does not give rise to a private treble-damage action under Section 7 of the Sherman Act. Petitioners argued, among other things, that *Keogh's* ban on treble-damage actions was inconsistent with the policies underlying subsequent legislation affecting interstate carriers under the antitrust laws, although such legislation had not explicitly overruled *Keogh*.[13] The Court rejected that argument, stating that, even assuming *Keogh* was unwise as a matter of policy, it should not be abandoned without explicit legislative action by Congress. 106 S. Ct. at 1928. The Court reasoned that because Congress had addressed this area of the law in subsequent legislation and had left the *Keogh* rule undisturbed, it was inappropriate for the Court to take the initiative in effect what would amount to a statutory amendment:

> Particularly because the legislative history reveals clear congressional awareness of *Keogh* . . . the fact that Congress specifically addressed this area and left

13. Petitioners in *Square D* relied on the 1948 Reed-Bulwinkle Act, Pub. L. No. 80-662, 62 Stat. 472 (1948) (current version at 49 U.S.C. § 10706), and the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, delineating an antitrust immunity for specific rate making activities.

> *Keogh* undisturbed lends powerful support to *Keogh's* continued viability.

Id.[14]

Id. See Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories, 460 U.S. 150, 170 (1983) ("Although Congress is aware of these criticisms, the [Robinson-Patman] Act has remained in effect for almost half a century. And it certainly is 'not for [this Court] to indulge in the business of policy-making in the field of antitrust legislation' . . .", quoting *United States v. Cooper Corp.*, 312 U.S. 600, 606 (1941)).

This Court's refusal in *Square D* to overturn a long-standing statutory construction absent explicit congres-

14. Congress has amended the antitrust laws no less than a dozen times over the past decade without ever restricting of limiting the *per se* rule against vertical price fixing. *See*, Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801, discussed at pp. 4-7, *infra;* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390; Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (May 28, 1980); Soft Drink Interbrand Competition Act, Pub. L. No. 96-308, 94 Stat. 939 (July 9, 1980); Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, 94 Stat. 1154, 1980 U.S. Code Cong. & Admin. News 5144 (Sept. 12, 1980); Foreign Trade Antitrust Improvements Act of 1982, enacted as Title IV of the Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246 (Oct. 8, 1982); Damages Payable to Foreign States, Pub. L. No. 97-393, 96 Stat. 1964 (Dec. 29, 1982); Antitrust Procedures and Penalties Act of 1984 (Tunney Act), Pub. L. No. 93-528, 88 Stat. 1706; Shipping Act of 1984, Pub. L. No. 98-237, 98 Stat. 67 (Mar. 20, 1984) (amended title 46 of the United States Code to change terms of antitrust exemption for ocean shipping); National Cooperative Research Act of 1984, Pub. L. No. 98-462, 98 Stat. 1815 (Oct. 11, 1984); Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (Oct. 24, 1984); and Health Care Quality Improvement Act of 1986, enacted as Title IV of Pub. L. No. 99-660, 100 Stat. 3784 (Nov. 14, 1986) (creating antitrust damage exemption for medical peer review).

sional action is equally applicable to the case at bar. The Court's conclusion in *Square D* rests on the "strong presumption of continued validity that adheres in the judicial interpretation of a statute." 106 S. Ct. at 1930, n.34, citing *NLRB v. Longshoremen*, 105 S. Ct. 3045, 3058 (1985) ("[W]e should follow the normal presumption of *stare decisis* in cases of statutory interpretation"); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) ("[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation").[15] This presumption of *stare decisis* is further strengthened where, as in the present case, Congress has addressed the area of law at issue without changing the precedent established by the Court:

> We are especially reluctant to reject this presumption in an area that has seen careful, intense, and sustained congressional attention. If there is to be an overruling of the *Keogh* rule, it must come from Congress, rather than from this Court.

106 S. Ct. at 1931.

Congress has consistently and vigorously supported continued application of a broad *per se* rule against vercal price fixing. As indicated above, Congress has amend-

15. The Court in *Square D* aptly quoted Justice Brandeis, the author of the opinion in *Keogh*, commenting later upon the presumption of continuity in statutory interpretation:

> *Stare decisis* is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation.

106 S. Ct. at 1931; quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

ed the antitrust laws no less than twelve times during the last decade without qualifying the *per se* rule one iota. Congress has also recently stated in no uncertain terms its rejection of any requirement to fix prices "at some level" for application of the *per se* rule against vertical price fixing. Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriation Act, 1986, *supra*.[16]

The Court should follow its own precedents and require that any effort to restrict application of the *per se* rule to vertical price fixing under the Sherman Act be addressed to Congress rather than to this Court.

V. Conclusion.

It has been said that "Realities must dominate the judgment. . . . The Anti-Trust Act aims at substance." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. at 47, quoting *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360, 377 (1933) (Hughes, C.J.). The reality here is that BEC was terminated by an agreement between Sharp and Hartwell for the purpose of eliminating price competition. The Fifth Circuit ignored the obvious anticompetitive purpose of this agreement and

16. For the past several years, Congress has even gone so far as to prohibit the Department of Justice from using appropriated funds for "any activity to alter the *per se* prohibition on resale price maintenance", including appearances in court. Section 605 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1987, enacted into law as part of the Continuing Appropriations, 1987, Pub. L. No. 99-591, ____ Stat.____. Notably excepted from this prohibition, however, is the Justice Department's activity before Congress, reflecting Congress's view that it is the proper forum in which to address any changes in this area of the law and not the courts.

created, against all precedent and common sense, a requirement that the *per se* rule will not apply unless Sharp and Hartwell also agreed to set prices "at some level". This requirement has been rejected by the decisions of this Court and by Congress. It is furthermore a nonsensical requirement because it assumes that without such an agreement the surviving distributor remains theoretically "free" to discount if he pleases, ignoring the fact that such a distributor will ordinarily use that freedom to raise his prices or his profit margins, which is precisely what occurred in the present case.

This Court once stated that it did not

> propose to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely.

United States v. General Motors Corp., 384 U.S. at 148. The Court should follow its precedents and reverse the Fifth Circuit's decision below.

Respectfully submitted,

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